



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

or the sale of goods by auctioneers, or by hawkers and peddlers."²⁵ The Supreme Court would not recognize that the treaty making powers extend "so far as to authorize what the Constitution forbids, or a change in the character of one of the states, or a cession of any portion of the territory of the latter without its consent."²⁶

Subject to these suggested limitations, it seems that the federal government may conclude treaties on any subject whatever, even one on which it is powerless to legislate, and thereafter, to give effect to the treaty, may enact statutes which will supersede state law to the contrary.

P. F.

CONSTITUTIONAL LAW: INJUNCTION BY SUPERIOR COURT OF ACT AUTHORIZED BY RAILROAD COMMISSION.—When reorganization of the California Railroad Commission was effected by constitutional amendment in 1911, it was declared, among other things, that the commission "shall have and exercise such power and jurisdiction . . . as shall be conferred upon it by the legislature, . . . and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and unlimited by any provision of this constitution. . . ."¹ In accordance with this generous grant of authority the legislature conferred upon the commission "power and jurisdiction to supervise and regulate . . . every public utility . . . and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."²

By the provisions of the same act the courts of the state, saving only the Supreme Court, were deprived of all jurisdiction to "review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties. . . ."³ The power of the Supreme Court in these premises was restricted to review of the order of the commission upon certiorari, and control of its actions, in appropriate cases, by mandamus.⁴

These provisions were first accorded judicial interpretation in *Pacific Telephone and Telegraph Company v. Eshleman*,⁵ where it was stated that their value was par; that of the tribunals of the

²⁵ *Pierce v. State* (1843) 13 N. H. 536, 576, affirmed (1847) 5 How. 554, 12 L. Ed. 279.

²⁶ *Geofroy v. Riggs*, *supra*, n. 8. For other suggested limitations, see the opinion of Mr. Justice Daniel in the License Cases (1847) 5 How. 504, 613, 12 L. Ed. 256, 305.

¹ Cal. Const., Art. XII, § 23. See similar provisions, *idem*, § 22, § 23a.

² Public Utilities Act, § 31, Cal. Stats. 1915, p. 132.

³ *Idem*, § 67, Cal. Stats. 1915, p. 161.

⁴ *Idem*.

⁵ (1913) 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C 822. Commenting thereon see William Carey Jones, *The Railroad Commission Case*, 2 California Law Review, 225.

state only the Supreme Court might question the doings of the commission; and that even the Supreme Court could inquire no further than whether the commission had "regularly pursued its authority".⁶ This principle of the Eshleman case, that such deprivation of the power of the courts is not objectionable, has been affirmed in subsequent decisions of our highest judicial body.⁷

These considerations seem to support the following thesis: the people of the state, mindful of the manifested incapacity of courts to deal satisfactorily with many perplexing problems of public service, have created the railroad commission, a body both administrative and judicial in character,⁸ to aid in solving them; that in determining the particular problems concerning which the aid of the commission is to be sought "the voice of the legislature shall be the supreme law of the land"⁹; that the function of the courts, in matters respecting public utilities, shall be only that of keeping the commission within the limits of the jurisdiction allotted to it, and, where requested, assisting the commission in the discharge of its duties.¹⁰

If the above interpretation is sound, then the holding of the district court of appeal upon rehearing in *Yolo Water and Power Company v. Superior Court*¹¹ should be subjected to the most searching scrutiny. In that case, for potent reasons, the commission permitted a public utility to divert waters of Clear Lake. The district attorney of Lake county sued in the superior court to enjoin the diversion as a public nuisance. The utility applied to the district court of appeal for a writ of prohibition, thus putting in issue the jurisdiction of the superior court.¹² Held, that the equity jurisdiction of the superior court is not divested by the constitutional and statutory provisions hereinbefore referred to,¹³

⁶ I. e., "whether it has exceeded its jurisdiction". *Quinchard v. Board of Trustees* (1896) 113 Cal. 664, 45 Pac. 856, construing this same language appearing in Cal. Code Civ. Proc., § 1074.

⁷ *Sexton v. Atchison etc. Ry. Co.* (1916) 173 Cal. 760, 161 Pac. 748—see Cal. report, p. 763: ". . . no court of the state, other than the supreme court, has any power to review the orders of the commission, or to control its official action"—*City of San Jose v. R. R. Comm.* (1917) 175 Cal. 284, 165 Pac. 967.

⁸ *William Carey Jones, The Railroad Commission Case*, supra, n. 5, citing *Imperial Water Co. v. Board of Supervisors* (1912) 162 Cal. 14, 120 Pac. 780.

⁹ Mr. Justice Henshaw in *Pacific Telephone, etc. Co. v. Eshelman*, supra, n. 5, at p. 658, Cal. report.

¹⁰ *Public Utilities Act*, § 75, Cal. Stats. 1915, p. 166, empowering the commission, by its attorney, to invoke the process of the courts against a public utility acting or about to act in contravention of the requirements of the commission.

¹¹ (Sept. 22, 1919) 30 Cal. App. Dec. 3, 185 Pac. 195. Rehearing denied by the Supreme Court, Nov. 7, 1919.

¹² *Hogan v. Superior Court* (1911) 16 Cal. App. 783, 117 Pac. 947; *Reclamation Dist. v. Superior Court* (1916) 171 Cal. 672, 154 Pac. 845.

¹³ In which the court "can discover nothing . . . that limits in any way the equity powers of the court . . . a view which is "further strengthened by the language of § 74 of the Public Utilities Act . . ." That section declares merely that the act shall not release any right of action for penalty or forfeiture accrued or later accruing under the laws of the state. The relevancy of this section is not entirely obvious despite the court's statement that it "would seem to put a fitting end to all discussion."

and that the writ should not issue. And authority to entertain the suit implies authority to issue the injunction prayed therein.

If the superior court, in terms deprived of power to review the commission's orders or control its action, can nevertheless enjoin A. from doing what the commission has lawfully directed him to do, the conclusion is obvious. In point of fact, the court is operating to "interfere with the commission in the performance of its official duties";¹⁴ exactly the thing it has been forbidden to do.¹⁵

Individual opinions may differ concerning the wisdom of bestowing vast powers upon commissioners, but the fact remains as pointed out in the opinion originally rendered in the principal case,¹⁶ that the purpose of the provisions regarding the railroad commission was largely to centralize in it control over public utilities, that authority of "sweeping and imperious character" has been conferred upon that body, and that if such a case as the present is not intended to lie solely within the cognizance of the commission it is difficult to see "how more apt language could have been chosen to express such purpose". Centralized authority subject to question, modification, and reversal by superior courts in fifty-eight different counties is indeed an anomaly, and one into which life should not be breathed by unaided judicial action, especially in times when centralization seems a possible countervailing force against further increase in the already staggering cost of government. The original holding in the principal case,¹⁶ which would deny the court's power of interference with the commission either directly or by controlling persons or bodies engaged in carrying out the commission's orders, has much to recommend it.

At all events, it is to be hoped that occasion will soon dispel the mist of doubt in which the decision here under consideration has enveloped this entire subject. And if the determination at that time should favor complete centralization of power regarding public utilities, then inquiry could properly be made concerning certain serious problems arising out of those cases where action of the commission would involve interference with private property; here mentioned as worthy of serious thought and constructive action.

The policy of California, as expressed in the fourteenth section of Article I of her constitution, is that private property shall neither be taken nor damaged for public use without just compensation being made its owner. But action of the commission, based upon the "plenary and unlimited" authority of the legislature, is not

¹⁴ "Official duties" including any duties defined by the Public Utilities Act. *Sexton v. Atchison, etc. Ry. Co.*, *supra*, n. 7.

¹⁵ By the Public Utilities Act, § 67, Cal. Stats. 1915, p. 161.

¹⁶ *Yolo Water & Power Co. v. Superior Court* (1919) 29 Cal. App. Dec. 507, 183 Pac. 453; petition for rehearing denied, 29 Cal. App. Dec. 775; application for transfer to the Supreme Court denied, 58 Cal. Dec. 127. Later a rehearing was granted by the district court of appeal, and the original judgment set aside. *Supra*, n. 11.

confined within the limits set by this provision.¹⁷ The recourse of the individual deprived of his property would be either the unsatisfactory process of suing the utility involved, if the deprivation had been accomplished through its agency,¹⁸ or else the provisions of the fourteenth amendment, invoked upon appeal from the commission's order.¹⁹ But the fourteenth amendment would be flimsy refuge in the case involving no physical taking of the property or total deprivation of its use, but consequential damage merely.²⁰ And query, as pointed out by Professor McMurray,²¹ in the case where the state is itself the aggrieved party, whether the fourteenth amendment could ever serve as refuge?

It is not lightly to be supposed that California desires departure from the policy of protection to private property set forth in her bill of rights. Nor is it a desirable consummation that the workings of her policy with reference to public utilities should give rise to frequent conflicts with the federal Constitution. Would it be amiss, therefore, to suggest that the possibility of conflict be minimized and the policy of the state in these two particulars be made harmonious by conferring upon the commission, in addition to its subsisting power of eminent domain, both power and adequate machinery for making reparation for consequential injuries, under the same general principle set forth in the first article of the California Constitution?²² E. M. P.

CONSTITUTIONAL LAW: NATURALIZATION: CONSTRUCTION OF THE WORD "ANARCHIST" AS USED IN THE IMMIGRATION STATUTES.—That the exclusionary provisions of the federal immigration

¹⁷ Mr. Justice Henshaw in *Pacific Telephone etc. Co. v. Eshleman*, supra, n. 5 at p. 658, Cal report; Mr. Justice Sloss, *idem*, at p. 686, 702; *City of San Jose v. R. R. Comm.*, supra, n. 7.

¹⁸ Cf. for example, *Conniff v. San Francisco* (1885) 67 Cal. 45, 7 Pac. 41, allowing recovery against a municipality for damages occasioned plaintiff's land by construction which the city, under legislative authorization, was carrying on.

¹⁹ *Pacific Telephone etc. Co. v. Eshleman*, supra, n. 5.

²⁰ "Due process of law" includes compensation. See Mr. Justice Sloss in *Pacific Telephone etc. Co. v. Eshleman*, supra, n. 5 at p. 697, Cal. report, and authorities there cited; *Associated etc. Oil Co. v. R. R. Comm.* (1917) 176 Cal. 518, 529, 169 Pac. 62; *Pacific Trans. Co. v. R. R. Comm.* (1917) 176 Cal. 499, 504, 169 Pac. 59. Not, however, where there is neither physical taking nor complete deprivation of use as in *Pumpelly v. Green Bay Co.* (1871) 13 Wall. 166, 20 L. Ed. 557, but consequential damage merely; physical, as in *Manigault v. Springs* (1905) 199 U. S. 473, 50 L. Ed. 274, 26 Sup. Ct. Rep. 127; or non-physical, as in the *Legal Tender Cases* (1871) 12 Wall. 457, 20 L. Ed. 287; *L. & N. Ry. v. Mottley* (1911) 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. Rep. 265, 34 L. R. A. (N. S.) 671. See *Nicholls on Eminent Domain* (2nd ed.) § 108 and ff.

²¹ In commenting upon the original decision in the principal case. 7 *California Law Review*, 445.

²² The power of making reparation is bestowed upon the commission only in the case where a public utility has exacted an excessive amount for services rendered. *Public Utilities Act*, § 71, Cal. Stats. 1915, p. 164; *Palo Alto Gas Co. v. P. G. & E. Co.*, P. U. R. 1918E 288 (Cal.). *Public Utilities Act*, § 60, allowing a party to complain of the acts of a utility regardless of whether or not he has been directly damaged thereby, contains no provisions for giving affirmative relief. Cf. the *Interstate Commerce Act*, §§ 13, 14.